Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SALLY FERNANDES,

Petitioner,

v.

VIACOM, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court has held that, in class actions, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the named plaintiff adequately represent the class *at all times*, including, as other appellate courts have made clear, during settlement negotiations. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

In the present case, which is a class action, the Delaware Supreme Court held — in a decision that reached a view of what the Due Process Clause requires contrary to the decisions of several of the United States Courts of Appeals — that the named plaintiff adequately represented the class during settlement negotiations even though he was not involved in the settlement discussions, but instead was "notified" of the settlement about the time it was reached. The Delaware Supreme Court further did so notwithstanding that the named plaintiff never consulted with the attorney who negotiated the settlement, and notwithstanding that the attorney who negotiated the settlement testified that he did not even know the named plaintiff's name.

The question petitioner proposes to present for review, should certiorari be granted, is whether, in such circumstances, the named plaintiff can have adequately represented the class as required by the Due Process Clause.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following were the parties to the proceedings in this case in the Delaware courts: Len Fernandes, Sally Fernandes, Eugenia Gladstone Vogel, Anthony Moratta, Rebecca Siegel, Anne Klein, Joan Otto, Frank Pernice, Virginia Rosenberger, Leonard Ganz, Lauren Carey, Sam Wiechner, Claire Rand, Palmetto Partners LP, Naline Yassin, Yehuda Glatzer, Howard Gunty Profit Sharing Plan, Howard L. Milkis, Michael Shaw, Mike Taylor, Linda Juarez, Anne-Pezza Fiorillo, David T. McLaughlin, William S. Levine, Arturo R. Moreno, Bruce S. Gordon, Jeffrey Sherman, George H. Conrades, Robert Downs Walter, Mel Karmazin, Farid Suleman, Sumner Redstone, Infinity Broadcasting Corporation, and Viacom, Inc.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of all Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Petition	6
A. The Appellate Courts of the Country Have Reached Contrary Conclusions as to What Role a Named Plaintiff Must Play in Representing the Interests of Absent Class Members	6

Contents

Page

B. Because of the Nature of Class Actions, Which Almost Invariably Entail Absent Class Members With Relatively Small Stakes in the Litigation, There are Few Class Actions in Which an Objector will have the Desire or Financial Incentive to Pursue Certiorari and to Thereby give this Court an Opportunity to Resolve this Important Constitutional Issue on a National Level 9

C. This Petition Presents an Issue of Public Importance Since There has Been Much Public Criticism to the Effect that Many Class Action Lawsuits are Driven by Lawyers for Their own Benefit, and a Decision by this Court Establishing a National Standard for the Due Process Clause Obligations of Class Representatives is Important to Maintaining Public Confidence in our Legal System 10

Conclusion 11

TABLE OF CITED AUTHORITIES

Page

Cases:

Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001) 7, 8

Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) .. 7

In re American Reserve Corp., 840 F.2d 487 (7th Cir. 1988) 9

In re California Micro Devices Securities Litig., 168 F.R.D. 257 (N.D. Cal. 1996) 6

In re Infinity Broadcasting Corp. Shareholders Litig., 802 A.2d 285, 2002 Del. LEXIS 408 (2002) .. 1, 3, 5, 7

In re Mego Financial Corp. Sec. Litig., 213 F.3d 454 (9th Cir. 2000) 7

Lewis v. Curtis, 671 F.2d 779 (3d Cir.), *cert denied*, 459 U.S. 880 (1982) 7

Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072 (2d Cir. 1995) 8

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... i, 6

Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991) 8

Cited Authorities

Page

United States Constitution:

Fourteenth Amendment ..... i, 2

Statutes:

28 U.S.C. § 1257 1

28 U.S.C. § 2101(c) 1

Rules:

Chancery Court Rule 23 2

Chancery Court Rule 23(b)(2) 2

Federal Rule of Civil Procedure 23 2

Miscellaneous:

5 Moore's Federal Practice § 23.25[4][c][ii] (3d ed. 1997) 8

Lead Institutional Plaintiff Withdraws From Litigation Against Pre-Paid Legal, Litigant Declares Participation Was Unintentional and States Suit is Without Merit, PRNewswire-First Call, August 15, 2002 10

Cited Authorities

Page

Karen Donovan, *Another Fine Mess for Milberg*, National Law Journal, January 31, 2000 10

Peter Elkind, *The King of Pain Is Hurting*, Fortune, September 4, 2000 10

Jason Honnin, *Florida Judge Compares Milberg Weiss Action to Squeegee Boy*, The Recorder, April 17, 2002 10

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Delaware Dated And Decided June 27, 2002 ..... 1a

Appendix B — Order And Final Judgment Of The Court Of Chancery Of The State Of Delaware, In And For New Castle County Dated October 29, 2001 ..... 16a

Appendix C — Transcript Of Decision Of Delaware Chancery Court Dated September 25, 2001 .... 21a

Appendix D — Excerpts Of Deposition Of Abbey Gardy, LLP, By Arthur N. Abbey Dated August 21, 2001 ..... 32a

Appendix E — Excerpts Of Deposition Of Steven G. Schulman Dated August 23, 2001 ..... 35a

Petitioner, Sally Fernandes, respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court which petitioner seeks to have this court review is reproduced in the Appendix at 1a and is reported at *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d 285, 2002 Del. LEXIS 408 (2002) (*per curiam*). The opinion of the Delaware Court of Chancery is reproduced in the Appendix at 21a, and is not reported.

STATEMENT OF JURISDICTION

Jurisdiction is proper in this court. The judgment sought to be reviewed is contained in an opinion of the Delaware Supreme Court filed June 27, 2002. No rehearing was sought.

The present Petition for Writ of Certiorari is filed within 90 days of the Delaware Supreme Court's June 27, 2002 decision, and is timely pursuant to 28 U.S.C. § 2101(c). Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution. It provides:

> **Amendment XIV**
>
> **Section 1** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action is a consolidation of numerous non opt out class actions brought in the Delaware Court of Chancery within hours of the August 15, 2000 public announcement by Viacom, Inc. ("Viacom") of an offer to acquire all of the Class A shares of Infinity Broadcasting Corporation ("Infinity") that it did not already own in a stock for stock merger transaction. These actions were brought on behalf of a Chancery Court Rule 23(b)(2) non opt out class of Infinity shareholders[1] and against Infinity and its directors (as well as Viacom) notwithstanding the fact that Infinity and its directors had not had time to even consider the Viacom offer, let alone accept or reject it.

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1. Chancery Court Rule 23 is identical in all relevant respects to Federal Rule of Civil Procedure 23.

By agreement of counsel, the first two lawyers to file suit were named "lead" or "general" counsel, and one of them, Arthur N. Abbey, proceeded to negotiate a settlement of the action based upon an increase in the stock for stock exchange ratio that (as described in defendants' filings with the Securities and Exchange Commission) had been negotiated entirely by Infinity's board and that (due to an intervening decline in the price of Viacom stock) resulted in class members (Infinity's public shareholders) receiving *less money* than they would have received under the original Viacom offer.[2] The settlement also provided for a multimillion-dollar attorneys' fee for Mr. Abbey and his co-counsel, and provided for the release of all absent class members' claims, known and unknown, against all defendants.

Petitioner Sally Fernandes intervened in the Delaware Chancery Court in January 2001, and objected to the settlement.[3]

---

2. That Mr. Abbey was the attorney who negotiated the settlement is clear from the deposition testimony of his co-lead counsel, Steven Schulman, who testified as follows:

> Q Were you involved in the settlement negotiation?
>
> A As allied counsel, with Mr. Abbey and I knew of, or what was directly involved in such discussion. Although I wasn't a direct participant in such communication, Mr. Abbey was a direct participation in every such communication but we did obviously definitely as a team.

Relevant portions of Mr. Schulman's deposition testimony are reproduced in the appendix at 35a.

3. Petitioner Sally Fernandes' son, Len Fernandes, was the original intervener, but he subsequently died and petitioner succeeded to his ownership interest and was substituted as a party in his stead by Order of the Delaware Supreme Court dated June 18, 2002. *See* App. at 2a n.1; *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d at 288 n.1.

Petitioner objected on a number of grounds. However, the objection that is relevant for purposes of this petition is her objection that the named plaintiff did not adequately represent her and other class members as required by the Due Process Clause because he was not involved in the settlement discussions, but instead was "notified" about the settlement about the time it was reached. Further, the named plaintiff never consulted with Mr. Abbey, the attorney who negotiated the settlement, and indeed, Mr. Abbey did not even know the named plaintiff's name. This was conclusively established by Mr. Abbey's deposition testimony, which is reproduced in the appendix and was in pertinent part:

> Q Mr. Abbey, who is your client in this litigation?
>
> A . . . I don't know that I know, the name as I sit here today of our client that our firm represents. I am not sure that I recall.
>
> * * *
>
> Q Did the client review the Complaint or any files at any time?
>
> A I don't know.
>
> Q How many times have you spoken with the client about this case?
>
> A To my knowledge, never.
>
> Q Has the client been consulted on settlement by you or anyone representing the class?

> A Not by me, but I don't know the answer to that question.

Appendix at 33a-34a.

Fernandes explicitly raised this constitutional law issue in her brief objecting to the settlement in the Delaware Chancery Court. Petitioner also explicitly raised this constitutional law issue on her appeal to the Delaware Supreme Court at pages 14-15 of her opening brief and pages 12-13 of her reply brief.

The Delaware Supreme Court addressed the issue in its opinion as follows:

> Although Fernandes cites deposition testimony taken from class counsel that suggests limited contact and substantially passive involvement by certain named plaintiffs, a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy. Our case law requires little more than that a representative be generally familiar with the litigation. Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings. Therefore, the mere fact that class counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class.

See App. at 9a-10a; *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d at 291.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that certiorari should be granted for at least three reasons. First, the appellate courts of this country have reached conflicting decisions as to what role the Due Process Clause requires the named plaintiff in a class action to undertake in representing the interests of absent class members. Second, because of the nature of class actions, which almost invariably entail absent class members with relatively small financial stakes in the litigation, there are few cases in which an objector will have the desire or financial incentive to pursue certiorari and to thereby give this court an opportunity to resolve this important constitutional issue on a national level. Third, and finally, this petition presents an issue of public importance, inasmuch as there has been much public criticism to the effect that many class action lawsuits are driven by plaintiffs' lawyers for their own benefit. A decision by this court establishing a national standard as to what role a class representative must play in litigating a representative lawsuit would thus play an important role in maintaining public confidence in our legal system.

A. The Appellate Courts of the Country Have Reached Contrary Conclusions as to What Role a Named Plaintiff Must Play in Representing the Interests of Absent Class Members

This court has made clear that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Since then it has been clear that this requirement necessarily applies during settlement negotiations.[4]

4. *See In re California Micro Devices Securities Litig.*, 168 F.R.D. 257, 260-61 (N.D. Cal. 1996) (collecting cases).

Since *Shutts*, however, the appellate courts of this country have come to divergent conclusions as to what is meant by "adequately represent." Here, as noted, the Delaware Supreme Court held that "a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy," and that "our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings." App. at 9a-10a; *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d at 291.

Several of the United States Courts of Appeals are in accord with the Delaware Supreme Court. *See, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985) ("The adequate representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and of whether plaintiffs have interests antagonistic to those of the rest of the class"). *See also In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 462-63 (9th Cir. 2000) (similar); *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.) (similar), *cert denied*, 459 U.S. 880 (1982).

Other of the United States Courts of Appeals have held to the contrary. For example, in *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481-83 (5th Cir. 2001), the Fifth Circuit held as follows:

> Even more unsettling is that the district court's presumption ignores the Constitutional dimensions of the adequacy requirement, which implicates the due process rights of all members who will be bound by the judgment . . .
>
> * * *

> As an initial matter, we articulate the adequacy standard outside of any specific statutory context.
>
> * * *
>
> We have described the adequacy requirement as one that mandates an inquiry into the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees . . . [The Due Process Clause] require[s] the class representatives to possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation.

Id. at 481-83.

The Second and Seventh Circuits are generally in accord. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995) ("class certification may properly be denied where the class representatives have so little knowledge and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys"); *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) ("the named plaintiff must have some commitment to the case, so that the representative in a class action is not a fictive concept"). *See also* 5 Moore's Federal Practice § 23.25[4][c][ii] (3d ed. 1997) ("Although counsel normally has a substantial influence on the course of class litigation, the class representative may not completely abdicate conduct of the case to counsel and must at least minimally supervise class counsel").

Petitioner respectfully submits that this court should grant certiorari to resolve this dispute among the nation's appellate courts as to what responsibilities the Due Process Clause requires class representatives to undertake in representative actions.

B. Because of the Nature of Class Actions, Which Almost Invariably Entail Absent Class Members With Relatively Small Stakes in the Litigation, There are Few Class Actions in Which an Objector will have the Desire or Financial Incentive to Pursue Certiorari and to Thereby give this Court an Opportunity to Resolve this Important Constitutional Issue on a National Level

Additionally, petitioner respectfully submits that this Court should take cognizance of the fact that most class actions involve absent class members with relatively modest stakes in the litigation. *See, e.g., In re American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988) (discussing issue generally).

Thus, there will necessarily be few class actions in which an objector will have the desire or financial incentive to pursue certiorari and thereby create the opportunity for this court to resolve the important question of what degree of involvement the Due Process Clause requires named plaintiffs in class or representative actions to exercise. As such, should the court not grant certiorari in the present case, it could be many years before another opportunity to hear the issue arrives, and before the Courts and litigants of this country will have this important constitutional law issue resolved on a national level. Petitioner respectfully submits that this constitutes another reason why her petition for certiorari should be granted.

C. This Petition Presents an Issue of Public Importance Since There has Been Much Public Criticism to the Effect that Many Class Action Lawsuits are Driven by Lawyers for Their own Benefit, and a Decision by this Court Establishing a National Standard for the Due Process Clause Obligations of Class Representatives is Important to Maintaining Public Confidence in our Legal System

Finally, petitioner respectfully submits that her petition presents an issue of public importance since in recent years there has been significant public criticism to the effect that many class action lawsuits are driven for the benefit of the plaintiffs' bar, not class members. *See, e.g., Lead Institutional Plaintiff Withdraws From Litigation Against Pre-Paid Legal, Litigant Declares Its Participation Was Unintentional and States Suit is Without Merit*, PRNewswire-First Call, August 15, 2002; Jason Honnin, *Florida Judge Compares Milberg Weiss Action to Squeegee Boy*, The Recorder, April 17, 2002; Peter Elkind, *The King of Pain is Hurting*, Fortune, September 4, 2000; Karen Donovan, *Another Fine Mess for Milberg*, National Law Journal, Jan. 31, 2000.

Given the significant public interest in the issue, petitioner respectfully submits that this court would render a significant contribution to the goal of maintaining public confidence in our legal system were it to grant certiorari and establish a national standard for the Due Process Clause obligations of named plaintiffs in class actions and other representative litigations.

CONCLUSION

For all of the foregoing reasons, petitioner Sally Fernandes respectfully petitions this Court to grant a writ of certiorari to the Supreme Court of Delaware.

Respectfully submitted,

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